

Don't Call a Spade a Shovel

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The crisis that we are currently living through highlights, again, the dangers of fake news but also the dangers of trying to regulate it: fake news tried to sow confusion about causes of (purportedly [5G wireless technology](#)) and cures for the pandemic ([gargling with warm salt water](#)); it threw baseless blame around like confetti ([the US supposedly created it as a biological weapon](#); and [yet another virus](#) was said to have emerged from China). Laws recently passed against fake news, in the case of Hungary purportedly to support the fight against the coronavirus, were criticized on this blog as being [prone to abuse](#). Such concerns are, not only but to a large extent, fueled by the apparent indeterminacy of the terms employed to regulate fake news. This is true for Hungary, but also for [France](#), [Russia](#) and several [Asian countries](#), which have already passed fake news legislation. Uncertainties concerning the definition may have discouraged other states from passing similar laws, out of legitimate worries over freedom of expression.

In fact, however, many scholars and institutions actually agree on the characteristics of the phenomenon. That they use different terminology at times does not change that (I.). There seems to be considerable agreement that false and distorted statements can be fake news – or disinformation, if you prefer (II.). What is lacking, to my mind, is an awareness that the difference between these two varieties is critical. Human rights law requires the distinction between false and distorted statements (III.). Non-legal efforts to counter fake news, e.g. fact-checking, are likewise harmed by disregarding it (IV.).

I. Fake News or Disinformation?

The European Union prefers the term '[disinformation](#)' over 'fake news'; some scholars prefer '[misinformation](#)'. Many commentators agree that the term 'fake news' should not be used, as it has been appropriated by some politicians who abuse it to ward off any criticism (see e.g. [here](#) and [here](#)). Personally, [I disagree](#) with that approach. The term is here to stay and will continue to be used by politicians and in everyday language. Critically reflecting and commenting on the term's meaning and use allows us to criticize those who abuse it. But regardless of whether you prefer 'disinformation' or 'fake news' as the umbrella term, both are in the end taken to encompass statements that are false or distorted. [Fact-checking](#) widely employs a similar set of terms.

II. False and Distorted Statements

Fake news (or disinformation) in a strict sense are lies, i.e. deliberately false factual statements. Consider, for example, the baseless allegation that [Poland asked Italy not to accept Russian aid](#) against the coronavirus or that it [closed its airspace for](#)

[the delivery of Russian medical aid](#) to Italy. In a wider sense, though, fake news or disinformation can also encompass distorted statements, which are in themselves factually correct, but presented in a way that makes it likely that false conclusions are drawn from them. Such statements are also called ‘misleading’. Consider, for example, a proposition that the [EU is incapable of handling the coronavirus crisis](#) that neglects (arguably on purpose) to mention almost all the measures that the EU did in fact take. Or take an observation that the [EU underestimated the virus](#) and that its Member States lack solidarity – that is, again, made without mentioning all of the EU’s responses and ignoring some of the help that was indeed lend between Member States.

For this categorization, it does not matter who makes the statements, how they are disseminated and for what purpose. They may be disseminated via formal news channels or informally, in particular through social media. Actors may act for economic gain, for fun (think of [trolls](#)) or as part of a coordinated effort to influence the public. These differences may be [important](#), legally and from a policy standpoint. But they do not affect whether a statement is false or distorted.

III. Distorted Statements are Opinions

The crucial difference between the qualification of a statement as false or as distorted is that you can (at least in theory) prove the former but not the latter. This is why repressive regulation must generally be confined to false news. Civil law claims, e.g. to delete from the internet false statements that harm someone’s reputation, and even criminal liability, e.g. for libel and slander, have long been applied in democratic states that respect the rule of law. Repressive action against false statements that harm public or private interests has been accepted as in principle compatible with the right to freedom of expression, in particular by the [European Court of Human Rights](#) and national courts like the [German Federal Constitutional Court](#). As long as its application is reviewed by strong, independent courts to prevent abuse and disproportionate interferences in individual cases, such regulation can be employed in a manner that complies with human rights and the rule of law.

Distorted statements are a different matter. Human rights jurisprudence, domestic as well as international, clearly [distinguishes](#) between the protection of factual statements and of opinions. Some statements, of course, may be [so distorted](#) that they have to be considered false; take for example the quotation of a politician’s statement that is truncated or [taken out of context](#) in a way that significantly changes its meaning (‘I do not support this!’). In that case, they may be treated as false factual statements and regulated accordingly. Generally, however, distorted statements will constitute opinions. A distorted statement uses factually correct assertions and argues that the selection and presentation of these facts are appropriate. Whether that is the case, or not, is a normative judgment, an opinion. You can argue that the selection and presentation of facts are inappropriate, but you cannot prove them to be false.

Under human rights law, opinions, in particular on politically sensitive issues, enjoy the highest level of protection, even those that seem entirely wrong to most people,

even those that ‘offend, shock or disturb the State or any sector of the population’, as the [European Court of Human Rights](#) rightly does not tire of saying. The right to freedom of expression will therefore in most cases prevent statements from being regulated in a repressive manner because they arguably are ‘distorted’, ‘misleading’, ‘tendentious’ – or, for that matter, ‘propaganda’. Other, less restrictive and therefore human-rights-compatible types of regulation that address distorted news may include rules on transparency, e.g. on the sources of funding of certain media (which would enable citizens to better judge their trustworthiness on certain issues) and a right to reply (which allows to reach the same audience with counter-arguments). Considering that humans seem to be inclined to stick even to facts that they know to be false – the [Continued Influence Effect of Misinformation](#) –, these may not seem to be the most ‘efficient’ tools against distorted statements. But repressive action against opinions that the state considers to be ‘wrong’ is fundamentally incompatible with freedom of speech and democracy. This threshold may not be passed; not even in a good faith effort against bad faith actors.

The French [Law on the Fight against the Manipulation of Information](#) of 2018 was therefore rightly [criticized](#) on this blog for including repressive sanctions not only against false, but also against ‘inaccurate’ or ‘misleading’ statements (*‘allégations ou imputations inexactes ou trompeuses’*) prior to certain elections. The Constitutional Council [confirmed the constitutionality](#) of these provisions, but ruled: ‘These allegations or accusations do not relate to opinions, parodies, partial inaccuracies or simple exaggerations. They are those for which it is possible to objectively demonstrate falseness.’ It thus interpreted these terms very narrowly, and along the lines of the argument made here, i.e. in the sense of false statements only (fake news or disinformation in a strict sense).

IV. Call a Spade a Spade

Finally, I would submit that distinguishing between false and distorted news is important not only for the legal reasons stated above. It is also important for policy reasons. To effectively address fake news or disinformation in its various forms, you should not conflate this distinction. Labelling statements as ‘false’ when they are actually merely ‘distorted’, can lead to the bizarre result that this labelling as ‘fake news’ can itself be dismissed as fake news in a way that will resonate at least with some audiences (for a vivid example see [here](#)). It may also make it easier for other actors to [call out, in bad faith, legitimate media](#) for spreading ‘fake news’ or ‘disinformation’.

The EU’s External Action Service, in particular through its East Stratcom Task Force, is doing important work by identifying and debunking fake news. Almost all of the examples in this blog post are owed to their project [EUvsDisinfo](#). Too much zeal in identifying disinformation can, however, easily cross the line to cover opinions and make the impression of ‘counter-propaganda’ – something that, for good reason, the Task Force [expressly wants to avoid](#). That the coronavirus ‘exposes the weakness of European humanism’ is clearly an opinion – which simply cannot be [disproved](#). The same is true for the proposition that ‘the end of the EU’ and the Schengen Area is approaching. These are statements on the future – and thus opinions incapable

of being '[disproved](#)' at the time they are made. You may consider such opinions to be grossly unfair, the predictions highly unlikely, you may consider that some are making such propositions in bad faith. But that does not change the fact that they are not only protected under human rights law but completely legitimate opinions – even if I do not share them. This is shown by the fact that, more or less, the same argument on an apparent weakness of the EU, its institutions, Schengen and a lack of solidarity among Member States, was made in an opinion piece in [The Washington Post](#). Such arguments, whether they are made in good or bad faith, can and should be dealt with: by answering them with convincing counter-arguments, not by disqualifying them as 'disinformation'.

